The court below, therefore, erred in their rulings on the demurrer, and also on the trial of the issues in fact.

A point is made under the 25th section of the Judiciary Act, that this court has no jurisdiction to reverse the judgment of the court below. But the right of the State to these school sections rests upon acts of Congress, which were set up and relied on in this case, and the decision of the court below against it.

The judgment of the court below is reversed, with costs, and the cause remanded, with directions to enter judgment overruling the demurrer to plaintiff's replications, and to issue *venire de novo*, &c.

JUDGMENT ACCORDINGLY.

THE BRIDGE PROPRIETORS *v.* THE HOBOKEN COMPANY.

1. Where a statute of a State creates a contract, and a subsequent statute is alleged to impair the obligation of that contract, and the highest court of law or equity in the State *construes* the *first* statute in such a manner as that the second statute does *not* impair it, whereby the second statute remains valid under the Constitution of the United States, the validity of the second statute is "drawn in question," and the decision is "in favor" of its validity, within the meaning of the 25th section of the Judiciary Act of 1789. This court may accordingly, under the said section, re-examine and reverse the judgment or decree of the State court given as before said. The case distinguished from *The Commercial Bank* v. *Buckingham's Executors* (5 Howard, 317). GRIER, J., dissenting.
2. A party relying on this court for re-examination and reversal of the decree or judgment of the highest State court, under the 25th section of the Judiciary Act of 1789, need not set forth specially the clause of the Constitution of the United States on which he relies. If the pleadings make a case which necessarily comes within the provisions of the Constitution, it is enough.
3. The statute of the legislature of New Jersey, passed A. D. 1790, by which that State gave power to certain commissioners to contract with any persons for the building of a bridge over the Hackensack River; and by the same statute enacted that the "said contract should be valid on the parties contracting as well as on the *State of New Jersey*;" and that it should not be "lawful" for any person or persons whatsoever to erect "any *other* bridge over or across the said river for *ninety-nine* years,"—is a contract, whose obligation the State can pass no law to impair.

Statement of the case.

4. A railway viaduct, if nothing but a structure made so as to lay iron rails thereon, upon which engines and cars may be moved and propelled by steam, not to be connected with the shore on either side of said river, except by a piece of timber under each rail, and in such a manner, as near as may be, so as to make it impossible for man or beast to cross said river upon said structure, except in railway cars [the only roadway between said shores and said structure being two or more iron rails, two and a quarter inches wide, four and a half inches high, laid and fastened upon said timber four feet ten inches asunder], is not a "bridge" within the meaning of the act of New Jersey, passed A. D. 1790, and just mentioned; CATRON, J., dissenting. And the act of Assembly of that same State, passed A. D. 1860, authorizing a company to build a railway, with the necessary viaduct, over the Hackensack, does not impair the obligation of the contract made by the aforesaid act of 1790.

THE Judiciary Act (§ 25) provides, that a final decree in the highest court of equity in a State, "where *is drawn in question the validity of a statute of . . . . . any State on the ground of its being repugnant to the Constitution of the United States, and the decision is in favor of such validity*, may be re-examined and reversed" in this court. And the Constitution of the United States provides, that "no State shall pass any . . . . . law impairing the obligation of contracts."

With these provisions in force, the State of New Jersey passed, A. D. 1790, an act creating a turnpike company, from Newark to Powles Hook (near New York), and authorizing commissioners to fix suitable sites for building bridges over the rivers Passaic and Hackensack, and to *cause to be erected* a bridge over each river, with a right to take toll from classes of persons and things enumerated in the act, and which may be summed up shortly as persons on foot, animals and *vehicles crossing the bridge*. The statute enacted, "that it should be lawful for the commissioners to contract with persons who would undertake the same for such toll, or for so many years, and upon such conditions, as in their discretion should appear expedient;" and further, "that the said *contract* should be valid and binding *on the parties contracting* as *well as on the State of New Jersey*, and as effectual, to all *intents and purposes whatever*, as if the same, and *every part, covenant, and condition therein contained had been particularly and expressly set forth* and enacted in this law." It was further

enacted, "That it should not *be lawful* for any person or persons whatsoever to erect, or cause to be erected [within certain limits specified], *any other bridge or bridges* over or across the said river; *provided always*, that if the said commissioners shall refuse or neglect, for the space of four years, to cause to be erected the said bridges, in pursuance of this act, or when erected, to maintain and support them, then *it shall and may be lawful* for the legislature of this State to repeal or alter this act, and to enact such other law or laws touching or concerning the premises herein enacted, as to them, in their wisdom, shall appear equitable and expedient."

In 1793, the commissioners contracted with one Ogden and others his associates, for the erection of the bridges authorized, and demised them to the said Ogden and his associates until November 24th, A. D. 1889, with a right to levy tolls as fixed in the contract. In 1797, the legislature of New Jersey created the said Ogden and his associates a corporation, which corporation the complainants below, the present plaintiffs in error, now were.

In 1860, the legislature of New Jersey, by statute, authorized another company altogether, to wit, the Hoboken Land and Improvement Company, the defendants in this case, to construct a railroad from the same town Newark to Hoboken (opposite New York), and to build the necessary "viaducts" over these same Passaic and Hackensack Rivers. And the statute enacted that if unable to agree with the parties owning or claiming them, it should be lawful for the company to "*take and appropriate*, use, and exercise, or cause to be taken and appropriated and exercised, so much of all *rights, privileges, franchises, property, and bridges or viaducts*, or such parts thereof as may be necessary to enable the said company to construct said railroad and branches, *first making, or causing to be made, compensation therefor, as hereinafter provided. Provided*, that nothing in this act shall authorize or empower the said company to construct more than one *bridge* over each of the rivers Hackensack or Passaic, and the *bridge*

over the Hackensack to be twelve hundred feet, river measure, from any other *bridge.*"*

Under the authority of the act of 1860, the Hoboken Company now began to erect their "structure" for carrying their railway across the Hackensack River, and inside of those limits within which the bridge proprietors considered that the act of 1790 gave them exclusive privilege of bridges.

* As respected "compensation" for rights, &c., used, a matter relied on in the dissenting opinion of one member of the court, GRIER, J., in this case, the statute provided that in case the Hoboken Company could not agree with the corporation owning the right, &c., application should be made by the company to the Chief Justice of New Jersey for the appointment of commissioners in the matter. Notice of the intended application for them, of not less than ten days, was to be given to the parties interested. A particular time was to be assigned for the appointment, and the appointment made only after the Chief Justice had satisfactory evidence of the service or publication of the notice. The statute then proceeded to say that the Chief Justice should appoint three disinterested freeholders such commissioners; and they, having first taken oath impartially to examine the matter and to make a true report, should meet at a time and place to be appointed by said judge, and proceed to examine the matter and the route of the railroad, so far as the same should be located, and report in writing what rights, &c., were necessary to be taken and appropriated for the purposes of the act, and should make a just appraisement of the value of the said rights, &c., and an assessment of such damages as should be paid by the company for them; which report, it was enacted—or in case of appeal, the verdict of the jury and judgment of the Supreme Court thereon—shall (the damages being first paid to, or if they refuse the same, or are unknown, "or labor under any disability, then deposited for the owner or owners in the Supreme Court) at all times be considered as plenary evidence of the right of the said company to take, have, hold, use, occupy, possess, exercise, appropriate, and enjoy so much and such parts of said rights, &c., so necessary to be taken, appropriated, &c."

It was further enacted in substance, that in case either the company or the claimants of the said rights, &c., should be dissatisfied with the report, either might appeal to the Supreme Court of the State by petition, the filing of which should give the court power to direct an issue, and to order a jury and a view of the road, and that the jury should assess the value of the rights. There was an enactment giving a right to collect by execution the amount awarded, with a *proviso*, that the appeal from the commissioners to the Supreme Court "shall not prevent the company from taking and appropriating, exercising, using, and enjoying the said rights, privileges, franchises, and property, or so much thereof as said commissioners shall assess and appraise, upon the filing of the aforesaid report, and paying the assessment and appraisement aforesaid, or making tender thereof, and depositing the same in the said Supreme Court for the owner or owners thereof."

This was done without the consent of the bridge proprietors, and without condemning the value of their right of franchise.

The proprietors of the bridges over the rivers, &c., hereupon filed a bill in the Court of Chancery, praying an injunction and general relief. THE BILL set out the act of 1790, authorizing the commissioners to lease out the privilege of building, and the bridge when built, for a term of years, and that it enacted that no person, during 99 years, should erect any other bridge over the river within the limits in question; that the commissioners had leased their privilege for 99 years to Ogden and his associates, who had built the bridges; the incorporation, &c. It then proceeded to insist thus:

"That the said act and said lease, and all the stipulations and provisions and enactments in them, and either of them, contained, became a *contract* between the State and said party of the second part to said lease, who are now represented by your orators; and by the same the State became *held and bound to and contracted* with said party of the second part, and are now, by force *of such contract*, held and bound to *your orators*, as provided in the act, that no persons whatever should erect *any other bridge* or bridges than that erected by laid lessees, and now belonging to your orators. And your orators insist *that the State cannot, by any law, violate, void or impair said contract, even upon providing and making compensation for the damages sustained thereby.*"

It next set out several statutes, which it charged recognized these rights, and then the act of 1860, and alleged that thereby the defendants were authorized to construct a railroad, and to erect viaducts or bridges over the Hackensack River, and to take and appropriate property, rights, franchises, &c., necessary to construct the railroad. It further set out the sections providing compensation for the franchises taken (see *ante*, p. 119, note), and that one section of the act, the first, *recognized the complainants' right as still existing.* The bill set forth further, that the defendants had commenced to build a bridge within the prohibited limits; and that the complainants had not given their consent to

this; nor the defendants tendered any compensation for the violation of their contract with the State.

It *insisted*, "that there exists no such public necessity for building a bridge within the prohibited limits as warrants or requires the violation of the contract,—even had the State the power to pass a law impairing the obligation of a contract: that there exists no public necessity for the construction of the defendants' railroad, such as to authorize the taking of the property and franchises of other persons or corporations."

It *submitted*, "that there does not exist that kind of public necessity which requires or justifies taking *private property for public use*, or the abrogation of a contract."

As respected the *contract*, the bill charged on the defendants as follows:

"And they sometimes give out and pretend that the State is not held and bound, *by any contract to or with your orators*, that no other bridge shall be erected within said limits, *whereas your orators charge the contrary to be true, and that the State is held and firmly bound to your orators by their contract* that no bridge shall be erected within said limits before the 24th day of November, 1889."

The bill prayed the defendants might be restrained from building the bridge commenced; and for general relief and injunction.

THE ANSWER, admitting that "of course the obligation of no contract can be impaired," declared "that the defendant *does not pretend* that any public necessity requires the violation of any contract," and it set up several defences.

1. That by the act of 1790, the State did "*not* contract," and therefore the defendant "denied" the allegation that it had done so; adding an admission, "that the said *lease* was a contract by which the State was bound," and an allegation that "this defendant is advised and insists, that it is the only contract between the State and the said lessees, or their alienees (if any), and was by said law declared to be the contract by which the State was to be bound."

2. That the prohibitory language, "it shall not be lawful for any persons to erect any other bridge," &c., in the act of 1790, was not in restraint of the legislature.

3. That any contract in the act of 1790 was discharged by a non-performance of the *conditions precedent* contained in the act.

4. That the structure of the defendant is not a *bridge* in the sense that the word "bridge" is used in the act of 1790; that it would differ from a bridge in these particulars:

a. "It will not," the answer averred, "be connected with the shore on either side of the river, except by a piece of timber under each rail, and must necessarily be made so as to make it *impossible for man or beast to cross said river, upon the viaduct, except in defendant's cars.*"

b. "The only *roadway*," it was further asserted, "between said shores and said structure, will be two or more *iron rails*, each of the width of two and one-quarter inches, and of the height of about four and one-half inches, laid and fastened upon timber, said rails *being at a distance of four feet asunder.*"

c. "It will be *impossible*," it was finally said, "*for any vehicle or animal, which can cross the river upon the bridge of complainants, to cross the same upon the railroad of defendant*, and no foot-passenger can cross the same with safety; nor is it intended that any foot-passenger shall, but on the contrary, the said railroad across the said river shall and will be so constructed, and this defendant intends to construct the same in such manner that no vehicle can cross the said river on the said road or viaduct of the defendant, *except locomotive engines and railroad cars resting, and which must necessarily move, upon iron rails, and cannot move upon any bridge which was known or used in the year* 1790, *or up to the time of the incorporation of the complainants*, and long after; and in such manner, that no foot-passenger or animal can cross said river on the railroad viaduct of the defendant."

5. The answer asserted, that any contract in the act of 1790 was discharged by the non-performance of *conditions subsequent.*

6. That the complainants had no assignment of the lease,

i.e., had not a particular evidence of the right to claim the benefit of the act of 1790.

7. That the exclusive franchise conferred by the prohibition contained in the act of 1790 had been destroyed by the complainants' own acts, admitted in the bill, in consenting to other bridges within the prohibited limits.

8. That a court of equity would not restrain by injunction the making of a bridge like that which the Hoboken Company proposed to make, and *on which railroad cars alone* could pass, if the complainants had an exclusive right and would not exercise it.

The case was argued below, as it was here also, on bill and answer only.

The *opinion* of the chancellor below, which, however, was no part of the record nor strictly in evidence here, was given at length. In stating what he considered the points before him to be, he said,

"The material issues are—

"1. Whether the complainants have, *by virtue of a contract* with the State, the exclusive franchise of maintaining a bridge across the Hackensack River, &c.?

"2. Whether the structure which the defendants are engaged in erecting is a *violation of the complainants' franchise?*"

After an argument on the first point, he concluded:

"I am of opinion, therefore, that the proprietors of the bridges over the Rivers Passaic and Hackensack have, *by contract* with the State, the *exclusive franchise* of maintaining said bridges, and taking tolls thereon, and that such contract *is* within the protection of that provision of the Constitution, which declares that no law shall be passed impairing the obligation of contracts."

And he adds:

"The remaining inquiry is, whether the structure which the defendants are erecting is a violation of the complainants' right?"

After an argument on this, the second point, to show that a viaduct, such as the defendants proposed to construct, was

not a "bridge," within the meaning of the act of 1790, he concludes:

"Applying to this contract the ordinary rules of interpretation, having regard to the subject-matter of the contract itself, considering that it related solely to the travel upon ordinary highways by methods then known and used, and that the complainants' franchise extended only to such travel, *the construction of a railroad bridge for the sole accommodation of railroad travel cannot be deemed an infringement of the complainants' right.*"

In the Court of Errors and Appeals, where only one or two of the judges spoke, the course of argument was much the same as with the chancellor.

The *decree* in the Court of Chancery was a simple dismissal, thus: "The chancellor being of opinion that the complainants are not entitled to restrain the defendants from building the bridge *or structure* complained of," therefore it is ordered, &c., that the bill be dismissed.

The *decree* in the Court of Errors and Appeals was a simple affirmance; the language being, that "the cause coming on to be heard, and the matter having been debated, &c., and the court having advised, &c., it is hereby ordered, adjudged, and decreed, that the decree of the chancellor be in all things affirmed, with costs."

On appeal to this court from the Court of Errors and Appeals of New Jersey—"the highest court of equity" in that "State,"—the questions were:

I. Whether this court had jurisdiction? that is to say, whether there had been drawn in question, in the State courts of New Jersey, the validity of a statute of that State on the ground that it violated the obligation of a contract? the decision being in favor of the statute.

II. If the court had jurisdiction, and so could re-examine and reverse the decision below, whether there was any ground for the reversal of the same? the points raised under the second being,

1. Whether there was ever meant to be any contract at all? If so,

2. Whether it was a contract such as bound legislatures of this day? If so,

3. Whether a "viaduct," such as was here proposed, was a "bridge" within the meaning of that contract?

Mr. Bradley and Mr. Gilchrist for the Hoboken Company:

I. *As respects jurisdiction.* The case was decided on bill and answer. Hence the allegations of the answer are to be taken as true; and those of the bill are not to be taken as true, except so far as admitted by the answer. Now what is it that the pleadings put in issue? The answer, admitting the inviolability of contracts, sets up eight defences in confession and avoidance. They are already stated.* What are they? We must be excused for recapitulation.

1. That by the act of 1790, the State did not make a "contract." *This defence involves simply the construction of the act of* 1790.

2. That the language of the act, "it shall not be lawful," &c., was not in restraint of the legislature. *This defence also did but involve the construction of this act.*

3. That if the act of 1790 was a contract originally, it was one on conditions precedent, and that the omission of the parties who claimed the benefit of it to perform those conditions precedently, operated to dissolve whatever contract there was. *This involved the construction of the act, a question of fact, and perhaps a question of general State law.*

4. That the defendants were not building a "bridge," within the meaning of the act of 1790. *This also involved but the interpretation of the act and a question of fact.*

5. That any contract was discharged by the non-performance of certain conditions subsequent named in the act. *Here again was only a question of construction, a question of fact, and perhaps a question of general State law.*

6. That the complainants showed no transfer to themselves of the rights originally given by the act. *This involved nothing beyond a question of fact, and the general rules regulating the transfer and devolution of property.*

* Ante, p. 121–3

7. That the exclusive franchise given by the act of 1790 had been destroyed by the complainants' own acts, as admitted in the bill, in consenting to other bridges within the prohibited limits. *This involved the construction of the act of* 1790, *and the law regulating the nature of incorporeal hereditaments.*

8. That equity would not restrain by injunction the making of a railway bridge like the defendants', if the complainants had the exclusive right and would not exercise it. *In this defence there was nothing but a question of equity practice.*

The decree of the chancellor was in four lines. That of the Court of Errors and Appeals in five. The former was a dismissal without reasons assigned. The latter an affirmance of the same kind. Though the opinions of the chancellor and the arguments of the judges in the higher court, as delivered, are not part of the record nor in evidence, we know as a fact that the bill was dismissed, and that this dismissal was affirmed, because all the tribunals considered that a viaduct was not a "bridge," within the intent of the act of 1790. The whole matter turned, therefore, on a construction of *that* act. The constitutionality of the act of 1860 was not in question, nor was its meaning discussed.

It is not true that the *entire subject* of contracts, like that of foreign commerce, and commerce between the States, is placed under the regulation of the Federal Government. Were it so, then, in every case where a State court should adjudicate upon a contract, its decision ought to be subject to revision by Federal authority. On the contrary, to give to this court jurisdiction over a decree of a State court, supposed to decide in favor of the validity of a State statute, by the very words of the Judiciary Act,—

1st. The validity of the State statute must have been drawn in question; and the statute must have been in "dispute."

2d. There is but one ground on which the validity must have been drawn in question, *i. e.*, the ground that the statute was *repugnant* to the Constitution of the United States.

3d. The decision of the Court must have been in favor of "*such*" its validity, with respect to the Constitution.

And it makes no difference whether the contract alleged to be impaired is an ordinary contract between private citizens, or a contract made by the State with citizens. State contracts, in this regard, are of no greater validity, and have no greater sanctity, than other contracts, whether they are in the shape of statutes, or charters, or grants of land, or franchises, or otherwise. In our case, the contract relied on is the act of 1790. The only law which is pretended to have impaired its obligation is the act of 1860, authorizing the defendants to construct their railroad and bridges. Does this law of 1860 impair the obligation of the alleged contract, contained in the act of 1790, giving to that contract any construction we choose? If it does not, then, although the courts of New Jersey may not have correctly construed that contract, this court has no jurisdiction, and cannot reverse their decision, any more than it could reverse the decision of the State court in any other case, however erroneous. The *Commercial Bank* v. *Buckingham's Executors*,* in this court is in point.

If a land proprietor, without any State legislation, had erected a bridge across the Hackensack River for his own use, within the prohibited limits, and the plaintiffs had sued him in the State courts as for an infringement of their franchise, could this court have reversed the decision of the State courts in the case? Certainly not. And why not? Because the case specified in the Constitution did not arise. No law was passed impairing the obligation of a contract. The decision of the State court on the validity and construction of the alleged contract would have been final. And so in this case, if no law has been passed impairing the obligation of the contract, the decision of the State court, though based on a construction of the contract, is final. If, indeed, a State court so interprets a State law as to make it operate to impair the obligation of a contract, that must be received here as the true reading of the law, and this court will then acquire jurisdiction. But, in this case, as we have said, the State

* 5 Howard, 317.

court has not put any construction upon the act of 1860 to render it obnoxious to this objection. The act of 1790 it was which was considered; but even it was not drawn in question on the ground of its being repugnant to the Constitution of the United States, and there neither was nor could have been a decision that it was not so repugnant. As a *result*, indeed, of the construction put on the act of 1790, the act of 1860 may be to be regarded as constitutional; so may other acts of the legislature, or the *bridge-building on the Hackensack of private individuals not under State authority.* But the act of 1860 has not been drawn in question, nor ever considered. *It* was outside of what was involved, and might have sat down by itself to look calmly on the conflict which it had raised between the act of 1790 and the courts of New Jersey, who were about to strangle that act's extravagant pretensions. If this is so, then the whole question is a domestic one, which belongs to the exclusive jurisdiction of the New Jersey courts; and they may construe the contract of 1790 as they please, just as they might any other contract in litigation before them.

Undoubtedly where the *only* title of a *plaintiff* is a State statute, the decision of the suit in his favor is a decision in favor of the validity of the statute. Such were cases which the court will recall: *Smith* v. *Maryland*, (6 Cranch, 286;) *Willson* v. *Blackbird Creek*, (2 Peters, 245;) *Craig* v. *State of Missouri*, (4 Id., 410;) *Martin* v. *Hunter's lessee*, (1 Wheaton, 304.) So, where the title of the plaintiff is good, unless a State statute under which the *defendant* claims, gives the *defendant* a title, and the defendant has *no other defence*, a decision of the suit in the defendant's favor would seem to be a decision in favor of the validity of the latter statute. But where many defences are set up, and the defendant's acts are attributed to a State statute, how is the court to determine that the validity of the statute was drawn in question, as repugnant to the Constitution of the United States, and that the mere decision of *the suit* against the party raising the questions of validity, is a decision in favor of the validity of the statute, and not a decision entirely independent of that question?

For such cases the court have from time to time settled rules.

I. The State statute complained of must be stated in the record.* Here it is merely referred to.

II. It must be averred in the pleadings that the statute is void.† This averment nowhere appears.

III. The particular clause of the Constitution of the United States must appear by the record to have been specified by the plaintiffs in error in the State court; it is not enough to show that the question was involved, and might and ought to have been considered.‡ Here the Constitution of the United States is not even mentioned in the record.

IV. Any general charge of unconstitutionality of the statute, will not be considered as referring to the Constitution of the United States, but to the State Constitution.§

The point insisted on, that the State cannot impair the contract, and other references to this incapacity of the State, are not so definite in the reference to a constitutional repugnance as the third exception in *Maxwell* v. *Newbold*, decided by this court,‖ and must be referred to the State Constitution, if referable to any constitution.

V. If it appears by the record that the cause might have been decided on the *construction* of a State statute not impeached, which admits of a construction consistent with the decision—without deciding in favor of the *validity* of the statute impeached—this court will not take jurisdiction.¶

That the decision in the principal case may be fairly referred to a *construction of the act of* 1790 *alone*, and to the courts' holding that a *railroad viaduct* is not a *bridge*, in the sense that the word "bridge" is used in the act of 1790, is manifest by the fact that the same decision of that question has been made in numerous cases;** and in the opinions of the chan-

* Maxwell *v.* Newbold, 18 Howard, 516.

† Medberry *v.* Ohio, 24 *Id.*, 413.

‡ Hoyt *v.* Shelden, 1 Black, 518; Maxwell *v.* Newbold, 18 Howard, 515, 517. § Porter *v.* Foley, 24 Howard, 415. ‖ 18 *Id.*, 514, 516.

¶ Commercial Bank *v.* Buckingham Executors, 5 *Id.*, 317.

** Cited *post*, in the opinion of the court, *ad finem*.

cellor and Court of Errors in the principal case, which are not cited to show what the decision *was*, but that the case will admit of such decision without deciding on the *validity* of any statute. This we have already said.

VI. Nor, as we have said also already, and in our general remarks, will the court take jurisdiction, if they see that, on a view of the case that might have been taken by the State court, it is a question depending on general principles of State law, as one or more of the defences do in the principal case. In other words, a controversy which turns entirely upon the interpretation of State laws is exclusively within the jurisdiction of the State courts, if they first acquire jurisdiction, and the Supreme Court of the United States has no appellate power over them.*

VII. Nor will the court take jurisdiction, when the court below decided the cause on a question of practice.†

The last defence against the relief prayed, is that a rule of practice in equity will prevent an injunction; and that rule is, that where the owner of a franchise (as of a ferry), neglects to exercise it (provide proper boats, &c.), the court will not interfere by injunction to protect the franchise from invasion. In the principal case, the *structure* complained of was a railroad bridge or viaduct, and the complainants had not provided such a bridge, although they claimed a right to prevent its construction.

II. *How stands the case as respects contract?*

1. Is there any contract in the case? The act of 1790 is a mere act of legislation; a measure by which the State, for the benefit of all, carries on a public work. The commissioners were vested with a portion of political power. There was no consideration for any contract with them. In a country where there is less indisposition to the granting of monopolies than in ours, *Sir Wm. Scott* says, with profound truth :‡

* Congdon *v.* Goodman, 2 Black, 574; Heirs of Poydras de La Lande *v.* Louisiana, 18 Howard, 192.

† Matheson *v.* Branch Bank of Mobile, 7 Howard, 260.

‡ The Elsebe, 5 C. Robinson, 155.

"A general presumption is, that government does not mean to divest itself of a universal attribute of sovereignty, unless it is so clearly and unequivocally expressed. The wise policy of our law, which interprets grants of the crown in this respect, by other rules than those which are applied in the construction of grants of individuals, must be taken in conjunction with the universal presumption. Against an individual, it is presumed he meant to convey a benefit, with the utmost liberality his words will allow. It is indifferent to the public in which person an interest remains, whether in the grantor or grantee. With regard to the grant of the sovereign it is far otherwise. It is not held by the sovereign as private property; and no alienation shall be presumed, except that which is clearly and indisputably expressed."

2. But, if the legislature had directly *contracted* with the bridge proprietors, that for ninety-nine years no other bridge within these limits should be authorized or built, would such law be valid to bind future legislatures as a contract? The power to make roads and build bridges is a governmental power. It is always a part of the sovereign or legislative power, and the duty to provide them is correlative. In New Jersey, now, as in 1790, all legislative power is in the Senate and Assembly, elected periodically by the people. No legislature can rest it or any part of it in any other body, or place it beyond the control of the next elected legislative body. Their only power is to *exercise*, not to alien their powers. The grant of a *power* or a *franchise* is a grant of property; it is an *act* of legislative power, not an abdication of such power. But if the franchise or power attempted to be granted is not property, but part of the legislative or sovereign power, the grant is void; it is revolution, or constitution-making, not legislation. The legislature could not grant away nor limit the power of future legislatures to punish crimes, to establish courts, to regulate succession to property, or to suppress drunkenness, in the whole State or in any section of it. These are not more properly or peculiarly legislative powers, than the power of making and regulating roads or bridges. If the legislature were to incor-

porate a prison discipline society, or juvenile reform society, and to enact that it should not be lawful without their consent to punish capitally any one under seventeen years of age, either in the State, or in the county where such institution was, this as law, while unrepealed, would be good, but as a contract it would not take away the power of future legislatures. An act incorporating a law school, with a provision that no Supreme Court judge should be appointed in this State, except from its pupils; *or*, incorporating a large hotel at the seat of government, with a provision that it should not be lawful for any legislature afterwards to prohibit the sale of ardent spirits in any quantities, and that no taverns should ever afterwards be licensed; *or* incorporating a bank, with provisions that no future legislature should allow any other power or corporation to transact any banking business,—are examples of the same kind of legislation as the grant of the monopoly, *if* any monopoly ever was granted, which we deny. On the theory of the complainants, a legislature of any peculiar views on vexed questions of government, could by a section in a charter bind all future legislatures from exercising legislative powers, and fix the law forever. All will agree that such acts would be void.

This bridge act, preventing the legislature for ninety-nine years exercising a clear governmental or legislative power needed for the public prosperity and protection, is of the same kind; the same as if it had been enacted that murder there should never be punished with death; or selling of liquor should be forever free.

If one power of legislation may be parted with or placed under the veto of a private corporation, not to be resumed, so may every power successively be and by degrees, and future legislatures may be such in name only. The government controlled by corporations would not be the republican government guaranteed by the Constitution.

This company *can* have no property or grant of property in the river, except in the length occupied by their own bridge. They have paid nothing to the public or to landowners above or below for this incumbrance or incubus

upon them that they should be for ninety-nine years deprived of the benefits of legislative protection.

3. Is the contract, admitting one, impaired?

The act of 1860 provides compensation for every right, privilege, franchise, or property which might be necessary to be exercised, used, appropriated, or taken in the construction of the railroad or bridges of the defendants. The exclusive right here claimed is a franchise. That such a right of franchise may be taken or extinguished for public purposes on compensation given, is settled at the present day.* A contract is property, but is no more sacred than other property. Its obligation is not impaired, but is recognized, when compensation is provided for its infringement.

III. *The structure is not a bridge within the meaning of the act of* 1790. Such a structure as the defendants propose to build, it had not, in 1790, entered into any man's mind to conceive of. *He* would have been regarded as a dreamer, or insane, who at that time had spoken seriously of such a fabric as is described in this case.† Now there are certain rules for the construction of grants, long established in the law. They come to us with the common law of England, are very ancient, and very settled. They may be found in the oldest reporters. One of them is thus enunciated in Lord Hobart's reports: "Words in grants shall be construed according to a reasonable and easie sense; not strained to things *unlikely* or *unusual;*"‡ and this rule, the great chief justice of King James I, illustrates by a case more ancient than his own day; citing a decision from 14 Henry VIII, "that if a man grant all his woods and trees, apple-trees do not pass." "Every grant," says another old reporter, Croke,§ "shall be expounded *as the intent was at the time of the grant;* as if I grant an annuity to J. S., until he be promoted to a *competent* benefice, and at the time of the grant he was but a mean person,

* West River Bridge *v.* Dix, 6 Howard, 529.

† *Ante*, p. 122.

‡ London *v.* The Collegiate Church of Southwell, Hobart, 303; and see Hewet *v.* Painter, 1 Bulstrode, 175.

§ Mildmay *v.* Standish, Croke Eliz., 35.

and afterward is made an archdeacon, yet, if I offer him a competent benefice, according to his estate at the time of the grant, the annuity doth cease."

As respects royal or government grants, it is an equally settled rule, that nothing passes by general words or by implication. The reasons are set forth by Sir William Scott, in the passage already cited.* Hence we gather from Plowden (*Case of the Mines*)† that if the King grants lands and the mines therein contained, it will pass only common mines, not mines of gold or silver; for the words in their *common* sense are satisfied by the passing of the *more usual* ones. So Sir John Davies, Chief Justice of Ireland in the time of James I, reports, that where the King granted to Sir R. M. all the territories adjoining a river, and all the fisheries within it, except three parts of the Fishery of Banne, the fourth part did not pass to him, for the King's grants pass nothing by implication.‡ The same doctrine is declared in Rolle's Abridgment, under the head of "*Prerogative Le Roy.*"§

The special character of the structure, and its want of resemblance to a bridge, is set forth in the defendants' answer.‖ Neither man nor beast can cross on it, save in the defendants' cars. The viaduct is for a kind of vehicle which no bridge known in 1790 can carry. It is wholly open. The only roadway is two or more iron rails, separated by a distance of four feet asunder. It is in fact no more a bridge than a *sieve* is a bucket.

Such a structure, it has been decided in North Carolina and in New York, is not a bridge.¶ If in Connecticut a

* *Ante*, p. 130. † Page 336.

‡ The Royal Fishery of The Banne, Davies, 157.

§ Rolle, speaking of the prerogative, and to what things it extends, says: (page 202), that a charter of exemption of lands of a corporation from forest law, only extends to lands then held, not those after acquired. His language is:

"Si Le Roy graunt al un evesque quod omnia maneria et omnes terræ et omnia feoda del dit evesque et ses successors inde in perpetuum, libera sint, et quieta de tiel forest del Roy, &c. Evesque alia maneria sua, terras, et homines suos clamare *non potest esse quieta de Foresta, quam illa quæ tempore confectionis illius chartæ fuerunt in seisina del dit evesque.*" (18 Edward I, *lib.* Parl. I. *Evesque de Coventry & Litchfield's case.*)

‖ *Ante*, p. 122.

¶ In North Carolina, McRee *v.* Wilmington Railroad Co., 2 Jones's Law,

different decision has been given in the Enfield Bridge case—a case which will be cited and relied on by the other side—it was in a case where the viaduct was planked and railed, which made a secure roadway for man, beast, and vehicles.

Mr. Zabriskie for the Bridge Proprietors:

1. *Has this court jurisdiction to revise?* The plaintiffs claim that they are protected by a contract with the State from any bridge being erected within certain limits, and that the State cannot, by law, impair that contract. They complain further that the State had passed such law, and that the defendants were proceeding under it to erect such bridge. The defendants admit the law, alleged to violate that contract, and that they are under it proceeding to erect this bridge. They deny the contract, or that the contract prohibits the erection of a railroad bridge.

The act of 1860 is the only authority the defendants have. No bridge can be erected over a navigable river but by authority of the sovereign. The record shows that the whole right depended on this statute. The decision dismissing the bill and refusing all relief, was in favor of the statute and the authority exercised under it. The validity of the statute of 1860 and the authority exercised under it was therefore drawn in question, as being repugnant to the Constitution of the United States. This was not done in words so reciting, or pointing out the clause of the Constitution, but by stating that it was in violation of the contract; in the words of the Constitution, that "it impaired the obligation of the contract." The defence was on the ground that the act or the bridge did not impair the obligation of the contract; either that there was no contract or that it did not extend to a railroad bridge. The record shows that this was the question raised and argued, and as there *could be* no decision in favor of the defendant except by holding the act and authority valid, the record shows by *necessary intendment* that this was the decision of the State court. If this

186; in New York, The Mohawk Bridge Co. *v.* Utica Railroad, 6 Paige, 564; Thompson *v.* The N. Y. & H. Railroad, 3 Sandford's Chancery, 625.

appears, this court has jurisdiction by the uniform current of decisions in this court to this time. *Crowell* v. *Randell** is the leading case. All cases recognize it.†

2. *Is there a contract in the case?* This we consider too plain for extended argument. The language of the act is pleonastically full on that subject. It declares that the contract of the commissioners shall bind the State of New Jersey, "to all intents and purposes whatsoever, as if the same and every part, covenant, and condition therein contained had been particularly and expressly set forth and *enacted.*"

3. *Does the act of* 1860 *violate this contract?* There is nothing in the act to show that the legislature intended to limit the words which it uses, or to make them inconsistent with the meaning which they have from their natural force. The words are "*any* other bridge;" words of the widest import; and which taken in connection with the fact that any kind of bridges would impair the income and value of the bridge erected by the plaintiffs, should settle the question. No lexicographer confines the meaning of the word to old-fashioned bridges, for old-fashioned coaches; the American "article" of the specific year of grace, 1790. In encyclopædias; in works on railway engineering; in acts of Parliament and of our legislatures authorizing railways; in all works written in the English language, by good authors, in which railway bridges are spoken of, they are called *bridges*, and the very act of 1860 brought here in question, uses the word "bridge" to designate railroad bridges; so using it seven times in its first section. The tubular iron structure for railroads over the Straits of Menai and over the St. Lawrence at Montreal, are well known wherever the language is spoken, as the Menai bridge and the Victoria bridge. Neither of them, any more than the defendants' bridge or other railway bridges, have a footway; and, though an agile pedestrian *might* clamber over any of them, such use would thwart the purpose of their construction, and be at great

* 10 Peters, 368, 398.

† Armstrong v. Treasurer of Athens, 16 Peters, 281; Lawlor v. Walker, 14 Howard, 152, 154.

peril to life. The *subject-matter* of the contract was to prohibit any injurious competition by bridges within the prescribed limits. Beyond the limits they were not to be protected; and within the limits only against bridges, not against ferries, tunnels, balloons, or any other device. *The object* was, that all passengers and cattle, and produce and goods, carried in the vehicles on which they had a right to take toll, should have no other way of passing the river on *any bridge* within these limits but this. This would compel them to cross by plaintiffs' bridge or to go out of their way, or by an inconvenient and tedious ferry-boat. And the intent of the legislature was, by this covenant, to induce capitalists to expend their money in building bridges which would not at first remunerate them, but by a long monopoly would. The object would not have been effected by protecting them only against a bridge like their own, which, if erected, would only take away one-half their custom, and allowing a railroad bridge, which would take away nineteen-twentieths of it. Had the act of 1790 contained in the contract against any other bridge, an exception of a railroad bridge, or plank road bridge, or any other bridge which might be used for any improved system of travel thereafter to be brought in use, the persons who built this bridge would never have undertaken it. A toll bridge, or a free bridge, or a bridge, which, like this, is used as part of a railroad line, charging no tolls *eo nomine*, but a fare for being carried over the whole route, in which compensation for the use of the bridge is included, all are within the object and intent of this prohibition. They all carry passengers, animals, and freight, that without them would pass over this bridge of the plaintiffs and pay tolls. The *object and intent* of the legislature coincide with the subject-matter of the act, and can only be carried out by prohibiting "any other bridge." It is idle to say that the plaintiffs cannot charge toll for locomotives, cars, elephants, &c., and are not bound to provide bridges for them, and, therefore, bridges can be built to accommodate them; and all passengers and carriages that should otherwise go over plaintiffs' bridge, be

carried on these new bridges. If the contract is clear, and the bridges both within the letter and object of it, the State must adhere to its contract although improvident.

In *The Enfield Toll-Bridge Company* v. *The Hartford and New Haven Railway Company*,* the point now before this court was fully argued in a full bench. Williams, C. J., one of the ablest of the jurists of America, in delivering the opinion of the court speaks as follows. We cite his language as much for its cogency, as we do the judgment for its authority. Thus he speaks for the law. It is impossible that we can speak more potently for ourselves. Let his exposition of law be our argument in the case. We adopt his language as our own:

"What is a bridge? It is a structure of wood, iron, brick or stone, ordinarily erected over a river, brook, or lake, for the more convenient passage of persons or beasts, and the transportation of baggage; and whether it is a wide raft of logs floating upon the water, and bound with withes, or whether it rests on piles of wood, or stone abutments or arches, it is still a bridge. The particular manner in which the structure is built is not described; but it is said to be much in the manner common to railroad bridges,—the bottom covered with plank and the sides secured by railing. It is a matter of notoriety that railroad bridges are built upon solid abutments of mason-work and resting on piers of stone between the abutments, thus giving strength and security to the frame above. It is not easy to see wherein such a structure differs from an ordinary bridge, except that, as it is to endure a greater burden, it is more solid and substantial. It is true the planks and rails upon it are laid in a manner most convenient for the cars which are to pass it, and not convenient for, perhaps not admitting, common vehicles, and not intended for, though admitting, the passage of foot-passengers.

"It would seem, therefore, as if this was what would be ordinarily called a bridge. But we agree that it is not the name which is sufficient to designate it. We must then consider the object: What was the intent of this structure? The safe and expeditious passage of persons, whether from greater or less

* 17 Connecticut, 56.

distances, over this stream, in the cars or carriages provided for that purpose, together with all baggage or freight intrusted to the care of the company. It may not, and it is not intended to accomplish all the objects of a common bridge, as it is not adapted to the common vehicles in use; but can that fact change its character as a bridge? A bridge adapted only to foot-passengers would be still a bridge; and it would hardly be claimed that such a bridge might be erected by the side of the plaintiffs' under the provisions of this act. We find then a structure of the form of a bridge, with the name of a bridge and of the character of a bridge. But go a step further, and see if it is not doing the business of a bridge? Certain facts are not specifically found, which we all know must exist, such as,—that every passenger in the cars must cross this river upon this bridge, within the limits secured to the plaintiffs. It is constantly doing at least some, if not much, of the business which the plaintiffs had a fair right to expect under their grant.

"We find then this structure with the form of a bridge, with the name of a bridge, with the character of a bridge, doing its work, and in this way doing the very injury to the plaintiffs which this proviso was designed to guard against. We cannot, then, but conclude that it is a bridge.

"It is said it is not the bridge contemplated in the act, or 'another bridge.' It cannot be claimed that by another bridge was intended a bridge exactly like this, or that a bridge of iron or stone would not be within the provisions, or even a bridge of boats; nor can it be claimed that a bridge much safer or stronger would be equally within the prohibitions. Nor is it the improvement in the structure of the bridge, nor the additional safety it affords to travellers, that will give the rights, or constitute it 'another bridge.'

"It is further claimed, that when the plaintiffs' charter was granted, railroads were unknown; therefore it cannot be supposed the legislature intended bridges connected with railroads. But whether the fact is so or not it can make no difference. Is a grant of this kind, which we here adjudged to be a contract, to be set aside, because an advantage not contemplated at the time may result from its violation? Is there any implied condition in such a grant, that, upon some new improvement being made, the grant should be void? How would such a claim be treated in other cases of great public improvement? Suppose

the city of New York had leased Fulton Ferry for a term of years, when no boats were known but those which were moved by the hand and wind or tide; after the introduction of steamboats, could they have leased the ferry to the persons who would navigate it by steam? Or could the legislature do this, if they had granted the ferry? We know of no principle by which this case can be distinguished from that."

This opinion is an answer to all that has been said by the opposite side on the point which it treats of; an answer to which that side can find no reply.

The case cited by the other side, from North Carolina, does not decide anything contrary to this. The suit was one for a penalty in violating an act of Assembly, passed in 1756, to encourage B. Herron to build a bridge over the Cape Fear River. Among other enactments made by the Assembly was this one: "It shall not be lawful for any person whatever to keep any ferry, build any bridge, or set any person or persons, carriage or carriages, cattle, &c., over the said river for fee or reward, within six miles of the same, under a penalty of twenty shillings for each offence."

The defendants pleaded specially a charter of 1833 to themselves.

Pearson, J., in deciding the case, said that it was *unreasonable* on the part of Herron, in consideration of the services he was to perform, to exact a perpetual monopoly of setting persons and property over the river by means of his bridge, so that it should never thereafter be in the power of the Governor, Council, and Assembly, no matter what might be the change in the condition of things, either in reference to the increased necessity for transports across the river, or the improved modes of transportation, to authorize any other mode of crossing the river, &c. "Suppose, for instance, two cities had grown up, one on either side of the river, so that the *necessities* of the public should call for a *dozen such bridges*, or the progress of science had called for a tunnel under the river, or a line of balloons over the river or a railroad rushing by steam from one extremity of the continent to the other, across the rivers, was it the meaning of the parties

that the government tied its own hands, and disabled itself for all time to come from doing its duty?"

But the Judge declines to decide the case upon that ground, and says:

"We are not, however, under the necessity of putting the decision upon the mere question of construction, for the Declaration of Rights at once puts an end to any such unreasonable pretension or claim to an hereditary and perpetual monopoly as that set up by the plaintiffs. *Declaration of Rights*, § 3, says 'that no set of men are entitled to exclusive or separate emoluments or privileges from the community but in consideration of public services;' § 22, 'that no hereditary emoluments, privileges, or honors ought to be granted or conferred in this State;" § 23, 'that perpetuities and monopolies are contrary to the genius of a free State, and ought not to be allowed.'"

And the case, proceeding entirely upon the peculiar Constitution of North Carolina, is evidently of no authority outside of that State.

The case cited from New York—even if it were in point—is more than answered by the reasoning of Williams, C. J., in the case of the Enfield Toll Bridge, which we have quoted at large a page or two back.

Mr. Justice MILLER delivered the opinion of the court:

The first point arising in the case is that which relates to the jurisdiction of this court to review the decision of the State court of New Jersey. This is a question which this court has always looked into in this class of cases, whether the point be raised by counsel or not; but here it is much pressed, and we proceed to examine it.

It is asserted by the plaintiffs in error, that the validity of the act of the New Jersey legislature of 1860, is drawn in question as being contrary to that provision of the Constitution of the United States, which declares that no State shall pass any law impairing the obligation of a contract; and that the decision of the State court was in favor of its validity, and the case is therefore embraced by the 25th section of the Judiciary Act.

It is objected, however, by the defendants, that the pleadings do not, in words, say that the statute is void because it conflicts with the Constitution of the United States, and do not point out the special clause of the Constitution supposed to render the act invalid.

It would be a new rule of pleading, and one altogether superfluous, to require a party to set out specially the provision of the Constitution of the United States, on which he relies for the action of the court in the protection of his rights. If the courts of this country, and especially this court, can be supposed to take judicial notice of anything without pleading it specially, it is the Constitution of the United States. And if the plaintiff and defendant in their pleadings, make a case which necessarily comes within some of the provisions of that instrument, this court surely can recognize the fact without requiring the pleader to say in words: "This paragraph of the Constitution is the one involved in this case."

Very few questions have been as often before this court, as those which relate to the circumstances under which it will review the decision of the State courts; and the very objection now raised by defendants has more than once been considered and decided.

In the case of *Crowell* v. *Randell*,* the motion to dismiss for want of jurisdiction was argued at much length by Mr. Webster, Mr. Sergeant, and Mr. Clayton, whose names are a sufficient guarantee that the matter was well considered. The opinion was delivered by Mr. Justice Story. He reviews all the cases reported up to that time, and lays down these four propositions as necessary to bring a case within the 25th section of the Judiciary Act.

"1st. That some one of the questions stated in that section did arise in the State court. 2d. That the question was decided by the State court, as required in the same section. 3d. That it is not necessary that the question should appear on the record to have been raised and the decision made in direct and positive terms, *ipsissimis verbis*, but that it is suf-

* 10 Peters, 368

ficient if it appears, by clear and necessary intendment, that the question must have been raised and must have been decided, in order to have induced the judgment. 4th. That it is not sufficient to show that the question might have arisen or been applicable to the case, unless it is further shown in the record that it did arise, and was applied by the State court to the case."

In the case of *Armstrong* v. *The Treasurer of Athens County*,* Judge Catron, in delivering the opinion of the court, said that the question of jurisdiction under the 25th section of the act of 1789, had so often arisen, and parties had been subject to so much unnecessary expense, that the court thought it a fit occasion to state the principles on which it acted in such cases. Referring especially to the manner in which the question on which the jurisdiction must rest shall be made to appear, he lays down six different modes in which that may be done. The first of these is "either by express averment or by necessary intendment in the pleadings in the case." The sixth is, "that it must appear from the record that the question was necessarily involved in the decision, and that the State court could not have given the judgment or decree which they passed, without deciding it."

Now, although there are other decisions in which it is said that the point raised must appear on the record, and that the particular act of Congress, or part of the Constitution supposed to be infringed by the State law, ought to be pointed out, it has never been held that this should be done in express words. But the true and rational rule is, that the court must be able to see clearly, from the whole record, that a certain provision of the Constitution or act of Congress was relied on by the party who brings the writ of error, and that the right thus claimed by him was denied.

Looking at the record before us, and applying to it these principles, we find no difficulty in the matter. The defendants claim, under the act of 1860 of the New Jersey legislature, a right to build their railroad bridge, or viaduct, over the Hack-

* 16 Peters, 281.

ensack River, inside the limits prohibited by the act of 1790. The plaintiffs say, that to permit this is to violate the contract which they have with the State of New Jersey, and therefore the act of 1860, so far as it confers such authority on the defendants, is made void by the Constitution of the United States, because it impairs the obligation of a contract. The State court dismissed the bill on these pleadings alone. It could not have done this, without holding the act of 1860 to be valid, as it was the only authority on which defendants rested their right to build any structure whatever over the Hackensack River. In holding that act to be valid, notwithstanding plaintiffs claim that it was void as impairing the obligation of their contract with the State of New Jersey, a decision was made within the very terms of the 25th section of the act of Congress of 1789.

It is said, however, that it is not the validity of the act of 1860 which is complained of by plaintiffs, but the construction placed upon that act by the State court. If this construction is one which violates the plaintiffs' contract, and is the one on which the defendants are acting, it is clear that the plaintiffs have no relief except in this court, and that this court will not be discharging its duty to see that no State legislature shall pass a law impairing the obligation of a contract, unless it takes jurisdiction of such cases.

The case of the *Commercial Bank* v. *Buckingham's Executors*,* does not conflict with this view, because that was a case in which the prior and the subsequent statutes were both admitted to be valid under any construction of them, and therefore no construction placed by the State court on either of them, could draw in question its validity, as being repugnant to the Constitution of the United States, or any act of Congress.

But there is a misconception as to what was construed in this case by the State court. It is very obvious that the statute of 1860 was *not* construed. No doubt is entertained by this court, none could have been entertained by the State

* 5 Howard, 317.

court, that it was intended by the framers of that act to authorize the defendants to build the railroad bridge which they were building, and which plaintiffs sought to enjoin. The act which was really the subject of construction, was the act of 1790, under which plaintiffs claim. For if that act and the proceedings under it amounted to a contract, and that contract prohibited the kind of structure which the defendants were about to erect under the act of 1860, then the latter act must be void as impairing that contract. If on the other hand the first act and the agreement under it was not a contract, or if being a contract it did not prohibit the erection of such a structure as that authorized by the act of 1860, the latter act was valid, because it did not impair the obligation of a contract. It was then the act of 1790 which required construction, and not that of 1860, in order to determine whether the latter was valid or invalid.

In the case of the *Jefferson Branch Bank* v. *Skelly*,* this court says: "Of what use would the appellate power of this court be to the litigant who feels himself aggrieved by some particular State legislation, if this court could not decide independently of all adjudication by the Supreme Court of a State, whether or not the instrument in controversy was expressive of a contract and within the protection of the Constitution of the United States, and that its obligation should be enforced notwithstanding a contrary conclusion by the Supreme Court of a State? It never was intended, and cannot be sustained by any course of reasoning, that this court should or could, with fidelity to the Constitution of the United States, follow the Supreme Court of a State in such matters, when it entertains a different opinion."

We are therefore of opinion, that the record before us presents a case for the revisory power of this court over the State courts, under the 25th section of the act of Congress of 1789.

Approaching the merits of the case, the first question that presents itself for solution, is whether the act of 1790, and the agreement made under it by the commissioners with the

* 1 Black, 436.

bridge builders, constitute a contract that no bridge shall be built within the designated limits, but the two which that statute authorized. This we think to be so very clear as not to need argument or illustration. The parties who built the bridges had the positive enactment of the legislature, in the very statute which authorized the contract with them, that no other bridge should be built. They had a grant of tolls on their bridges for ninety-nine years, and the prohibition against the erection of other bridges was the necessary and only means of securing to them the monopoly of those tolls. Without this, they would not have invested their money in building the bridges, which were then much needed, and which could not have been built without some such security for a permanent and sufficient return for the capital so expended. On the faith of this enactment they invested the money necessary to erect the bridges. These acts and promises, on the one side and the other, are wanting in no element necessary to constitute a contract. Such legislative provisions of the States have so often been held to be contracts, that a reference to authorities is superfluous.

We are next led, in the natural order of the investigation, to inquire if the contract of the State forbid the erection of such a structure as the defendants were authorized to erect, and which they proposed to erect, under the act of 1860.

This question, upon the decision of which the whole case must turn, we approach with some degree of hesitation. It is now over seventy years since the contract was made. A period of time equal to three generations of the human race has elapsed. During that time the progress of the world in arts and sciences has been rapid. In no department of human enterprise have more radical changes been made, than in that which relates to the means of transportation of persons and property from one point to another, including the means of crossing water-courses, large and small. The application of steam to these purposes, on water and on land, has produced a total revolution in the modes in which men and property are carried from one place to another. Perhaps the most remarkable invention of modern times, in the in-

fluence which it has had, and is yet to have, on the affairs of the world, as well as in its total change of all the elements on which land transportation formerly depended, is the railroad system. It is not strange, then, that when we are called to construe a statute relating to this class of subjects, passed before a steam engine or a railroad was thought of, in its application to this modern system, we should be met by difficulties of the gravest character.

On the one hand, we are told that the structure about to be erected by defendants is a bridge: simply that, and nothing more or less; that such is the name by which it is now called, and that it is, therefore, within the literal terms of the act; and that it performs the functions of a bridge, and is, therefore, within the spirit of the act. On the other hand, it is denied that the structure is a bridge, even in the modern sense of that word, since it is urged that the word is never applied to such a structure, without the use of the word railroad, prefixed or implied; and that it performs none of the functions of a real bridge, as that term was understood in the year 1790.

In all the departments of knowledge, it has been a constant source of perplexity to those who have attempted to reduce discoveries and inventions to scientific rules and classifications, that old terms, with well-defined meanings, have been applied so often to things totally new, either in their essence or in their combination. It is to avoid the danger of being misled by the use of a term well understood before, but which is a very poor representative of the new idea desired to be conveyed, that our modern science is enriched with so many terms, compounded of Greek and Latin words, or parts of words. It does not follow, that when a newly invented or discovered thing is called by some familiar word, which comes nearest to expressing the new idea, that the thing so styled is really the thing formerly meant by the familiar word. Matters most intimately connected with the immediate subject of our discussion may well illustrate this. The track on which the steam-cars now transport the traveller or his property is called a road, sometimes, perhaps gene-

rally, a railroad. The term road is applied to it, no doubt, because in some sense it is used for the same purpose that roads had been used. But until the thing was made and seen, no imagination, even the most fertile, could have pictured it, from any previous use of the word road. So we call the inclosure in which passengers travel on a railroad, a coach; but it is more like a house than a coach, and is less like a coach than are several other vehicles which are rarely if ever called coaches. It does not, therefore, follow, that when a word was used in a statute or a contract seventy years since, that it must be held to include everything to which the same word is applied at the present day. For instance, if a Philadelphia manufacturer had agreed with a company, seventy years ago, to furnish all the coaches which might be necessary to transport passengers between that city and Baltimore for a hundred years, would he now be required by his contract to build railroad coaches? Or, if a company had then contracted with the Government to build and keep up good and sufficient roads, to accommodate mails and passengers between those points, for the same time, would that company be bound to build railroads under that contract? Yet the structure which the defendants propose to build over the Hackensack is not more like a bridge of the olden time than a railroad is like one of its roads, or a railroad coach is like one of its coaches. It is not, then, a necessary inference, that because the word bridge may now be applied by common usage to the structure of the defendants, that it was therefore the thing intended by the act of 1790.

Let us see what kind of structure the defendants proposed to build.

It is an extension of the iron rails, which compose the material part of their road, over the Hackensack River, together with such substructure as is necessary to keep them in place, and enable them to support the cars which cross on them. There is no planked bottom, no roadway or path, nothing on which man, or beast, or vehicle can pass, save as it is carried over in the cars of the defendants. Was this

kind of thing in the minds of the framers of the act of 1790, or of the commissioners who let the contract? Or would the term bridge as then used by them, or by common usage, have included such a thing? We have no hesitation in answering both these questions in the negative. We are therefore quite clear that the adoption of that word to express the modern invention, does not bring it within the terms of the act, if it is not within the intent of it. We will inquire, therefore, a moment, if it is within the spirit of the act, and the accompanying contract with the commissioners.

There is no doubt that it was the intention of those who framed those two documents, to confer on the persons now represented by the plaintiffs, some exclusive privilege for ninety-nine years. If we can arrive at a clear and precise idea what that privilege is, we shall perhaps be enabled to decide whether the erection proposed by defendants will infringe it.

In the first place it is not an exclusive right to transport passengers and property over the Hackensack and Passaic Rivers, within the prescribed limits, for there is no prohibition of ferries, nor is it pretended that *they* would violate the contract. In the next place, it is not a monopoly of the right to build bridges within the prescribed limits, because they were only authorized to build one bridge over each river, and the statute enacted expressly, that it was unlawful to build any other bridge, by any person or persons, without excepting them. Besides, the building of a bridge was not the privilege, but the duty, of those who had the contract; a duty which constituted the consideration for the privilege which was granted to them.

The right to collect toll of persons and things passing over their bridges, is the privilege or franchise which they have, and that right is rendered valuable by the prohibition to build other bridges within the limits designated. This prohibition of other bridges is so far a part of the contract, and only so far, as it is necessary to enable plaintiffs to reap the benefit of their right to collect toll for the use of their bridges. The

extent to which tolls may be levied by the bridge owners, and the classes of persons and things on which they may be levied, are enumerated distinctly, and fixed by the contract. They may be summed up shortly, as persons on foot, animals, and vehicles, passing over the bridges. If the proposed structure is essentially calculated to interfere with, or impair the right of plaintiffs to collect these tolls, we are unable to see it. No animal can pass over it on foot. No vehicle which can pass over the bridge of plaintiffs can by any possibility pass over that of defendants. No class of persons, or things, of which plaintiffs can exact toll, can evade that toll by using the structure of defendants.

It may be said, that passengers and property now transported by that railroad, would be compelled to use the bridge of plaintiffs, if there were no such road and no such viaduct. This might be true to a very limited extent, if plaintiffs could annihilate all railroads running in the direction of the road which passes over their bridge. But this they cannot do. And, as to the road of the defendants, if they are not permitted to pass the Hackensack within the limits claimed by plaintiffs, they can with more expense cross it somewhere else. That being done, it is not believed that the number of passengers, or the amount of freight carried in wagons which would cross on the bridges of plaintiffs, in consequence of this change in the location of the railroad viaduct, is appreciable.

As the plaintiffs have no right to build any more bridges, and as the viaduct of defendants does not impair that which is really their exclusive franchise, we do not perceive how the law which authorizes such a structure can impair the obligation of the contract, made in 1790, by the State, with the bridge owners.

These views are not without the support of adjudged cases, which, if not in all respects precisely such as the one before us, are sufficiently so to show that they were considered, and entered largely into the reasoning upon which the judgments of the courts were founded.

In the *Mohawk Bridge Company* v. *The Utica and Schenec*

iady Railroad Company,* the plaintiffs claimed an exclusive franchise, similar to that held by plaintiffs in this case, which the defendants, as they alleged, were about to violate by erecting a structure for the use of the railroad, over the same stream, within the prescribed limits. The chancellor refused the injunction upon the ground that the grant to plaintiffs was not exclusive, which was at that time a very doubtful question in New York; and also upon the ground that the exclusive right to the toll-bridge would not be infringed by the erection of a railroad bridge, within the limits over which the exclusive right extended.

In the case of *Thompson* v. *The New York and Harlem Railroad Company*,† where the contest was again between a bridge owner, claiming exclusive rights, and a railroad company seeking to cross the stream within the bounds of plaintiff's claim, the assistant vice-chancellor refers to the case above mentioned, and says that he refuses the relief on both the grounds therein mentioned.

The case of *McRee* v. *The Wilmington and Raleigh Railroad Company*,‡ was an action at law, by the owner of a bridge, who set up an exclusive franchise, against a railroad company whose track crossed the stream within the limits of his franchise, for a penalty allowed by statute for any violation of his right of toll. It is true, that the court rests its decision mainly on the ground, that by the bill of rights of the State of North Carolina, no such monopoly as that claimed by plaintiff can exist. But they argue very forcibly, that a railroad bridge is no violation of a franchise for an ordinary toll-bridge, and intimate strongly that they would so hold if the case required the decision of the point.

The case of the *Enfield Toll-Bridge Company* v. *The Hartford and New Haven Railroad Company*,§ has been cited by counsel and much relied on, as deciding the principle in question the other way. And perhaps a fair consideration of the case, and the line of argument of the learned judge who delivered the opinion, justifies counsel in claiming that

* 6 Paige, 564.

† 3 Sanford, 625.

‡ 2 Jones Law, 186.

§ 17 Connecticut, 56

it is in conflict with the views we have here expressed. In that case, however, it was found by special verdict, as one of the facts on which the action of the court was asked, that the defendants' road and bridge would, to a certain extent, diminish the tolls of plaintiff; a fact which is not found in the case before us, and which, as we have already shown, we cannot infer from its record. What influence this fact may have had in the minds of that court we cannot say. We are, however, satisfied that sound principle and the weight of authority are to be found on the side of the judgment rendered by the New Jersey Court of Errors and Appeals in this case; and accordingly that

JUDGMENT IS AFFIRMED.

Mr. Justice CATRON, after stating the case:

1st. I think this court has jurisdiction. In the court below the question was, whether the monopoly granted to the turnpike company bound the State not to allow another bridge to be built within certain limits? Such is the claim of the bill. The State court held that the contract claimed to have secured the monopoly was not violated. The contract was construed, and the correctness of that construction we are called on to examine.

2d. The State contracted with the turnpike company not to grant to others the privilege of erecting another bridge within the limits covered by the monopoly; and the contract was violated, if the railroad bridge would be a structure within the meaning of the charter of the turnpike company. The main question presented is, whether the legislature of New Jersey has the power to convey by contract, binding their successors (for ninety-nine years, or forever) not to exercise the sovereign right of improving the State by additional roads and bridges? If so, then the left bank of the Delaware and the right bank of the Hudson could be granted by an irrevocable contract, whose obligation was beyond the reach of future legislation.

3d. That the bridge being erected by the railroad company is within the meaning of the grant to the turnpike

company, and violates it, is to my mind free from doubt. The object was to confer a monopoly of crossing the river by the turnpike bridge only, and that this railroad bridge can, and probably will, engross the carrying of passengers and freight, to the injury and probable ruin of the value of the turnpike bridge, is evident. The legislature, in the railroad charter, has made careful provision that just compensation shall be made for private property taken for the purposes of the road; and as the bridge and abutments are part of the road, it is assumed by the railroad company that the contract set up by the bill can be compensated in money. If the turnpike bridge had been taken by the railroad company, then it is conceded that a right to compensate existed. But the difficulty of dealing with a sovereign right as private property, which is claimed by the old corporation, presents the difficulty lying at the foundation of this controversy. Here are the proprietors of the land on each side of the river, whose right to just compensation is not open to controversy, if their lands are taken; their claim is for private property, and the land is taken by the sovereign right claimed by the turnpike company. It can only come in to be compensated for *public* property, which the eminent domain clearly is. For the private property taken on either bank of the river, underlying the eminent domain, the new company has already paid. But, for this public sovereign right no second compensation is provided by any constitution; it is only in cases of "private property taken for public use," that just compensation is secured to the owner.

If, however, I am in error in this assumption, then there is a provision, plain and simple, in the railroad charter, securing compensation, which obviates all objection to the erection of the railroad bridge, and on this ground I think it very clear that the bill was properly dismissed.

Mr. Justice GRIER, dissenting:

I do not concur in the opinion just read by my brother Miller; not that I question the correctness of the judgment of the Court of Appeals of New Jersey; but this court, by

affirming their judgment as to the true construction of the act of 1790, have demonstrated that they have no jurisdiction of the case.

The act of 1860, it is clear, is not repugnant to the Constitution or laws of the United States. The proposition that one legislature can restrain the power of future legislatures from erecting a bridge for ninety (and if ninety, a thousand) years, for a distance of ten miles (and if ten, a hundred), will hardly be asserted by any one.

That a State may, in its exercise of eminent domain, condemn a franchise as it might lands, cannot now be disputed.

Now, the act of 1860 protects carefully all the rights of the defendants under the act of 1790, and requires compensation to be made them if they are injured.*

The complaint is not that the legislature have passed any act impairing the obligation of the contract, but that the courts of New Jersey have misconstrued the act of 1790, which gives them their franchise. Now, it cannot be pretended that the validity of this act is drawn in question on the ground of repugnancy to the Constitution. Their own courts have decided that a railroad viaduct is not a "bridge," and the aim of the plaintiffs in error, by this writ of error, is to have this court to give a different construction to their charter. If, besides, the plain words and intention of the act of Congress conferring jurisdiction on this court under the 25th section, a decision of this point were necessary to demonstrate the unwarranted assumption of jurisdiction in this case, it will be found in the unanimous opinion of this court in *Commercial Bank of Cincinnati* v. *Buckingham.*† That case was decided after very full argument by able counsel. It was the unanimous judgment of this court. It is precisely in point, and it may be said in this case as in that, "If this court were to assume jurisdiction of this case, it is evident that the question submitted for our decision would be, not whether the statute of Ohio is repugnant to the Constitution of the United States, but whether the Su-

* See ante, p. 119; note. REP.

† 5 Howard, 342.

preme Court of that State has erred in its construction of it. It is the peculiar province and privilege of the State courts to construe their own statutes, and it is no part of the functions of this court to review their decisions, or assume jurisdiction over them on the pretence that their judgments have impaired the obligation of contracts."

I therefore protest against this decision of the court as usurpation of jurisdiction not given to us by the Constitution or the acts of Congress. It disregards the plain words of the statute and the unanimous ruling of this court. If it be received as a precedent, it will draw to the examination of this court the construction of every act of incorporation or grant of a franchise by a State legislature. The clause of the Constitution which forbids a State to pass any act impairing the obligation of contracts will have to be construed as a general power given to the courts of the United States to restrain the courts of a State from making mistakes in the construction of their own statutes.

The opinion of my brethren of the majority, in order to sustain this assumption of jurisdiction, takes it for granted that, as a franchise is a contract, a State, in the exercise of its right of eminent domain, cannot condemn a franchise by paying its value, as well as the land of an individual. This is directly contrary to frequent decisions of this court. Yet such is the act of 1860. As I have said, it carefully saves the rights of plaintiffs, and directs compensation to be made in case of any injury to the same. I cannot give my assent to a decision founded on such an assumption, or which may hereafter be quoted to establish such a doctrine.

JONES ET AL. *v.* MOREHEAD.

1. The claim of Sherwood, under his patent, granted in 1842, and extended in 1856, for "a new and useful improvement in door-locks"—so far as the claim is for "making the cases of door-locks and latches double-faced, or so finished that either side may be used for the outside, in order that the same lock or cased fastening may answer for a right or left